

Internal Revenue Service
memorandum

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Br4:GBFleming

date: JUL 01 1988

to: District Counsel, Dallas SW:DAL

from: Director, Tax Litigation Division CC:TL

subject: Request for Technical Advice: [REDACTED]
[REDACTED]

This responds to your memorandum dated April 25, 1988, requesting technical assistance related to the above referenced action for refund of windfall profit taxes ("WPT"). The Department of Justice ("DJ") has requested the views of our Office respecting arguments that should be raised in response to the plaintiff's motion for partial summary judgment.

ISSUE

Whether the 6 year statutory period for assessment and collection of windfall profit taxes, set forth in I.R.C. § 6501(e)(3), is applicable where the taxpayer's quarterly return for windfall profit tax omitted an item of tax exceeding 25 percent of the amount reported on the return but the transaction giving rise to such item was disclosed in the return.

CONCLUSION

Because the disclosure exception of I.R.C. § 6501(e)(3) is not applicable to the windfall profit tax, the 6 year limitations period applies.

FACTS

The plaintiff is engaged in the manufacture and distribution of petroleum products. For the two quarters ended [REDACTED], and [REDACTED], plaintiff timely filed Forms 720 (Quarterly Federal Excise Tax Return) and 6047 (Windfall Profit Tax) reporting liability for the windfall profit tax on tier two stripper well oil as if it were not an independent producer. In Witco Chemical Corp. v. United States, 2 Cl. Ct. 504 (1983), aff'd, 742 F.2d 613 (Fed. Cir. 1984), the Claims Court determined that the taxpayer was an "independent producer" and not a "retailer" within the meaning

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of section 613A(d)(2) because its annual sales of petroleum products in small quantities to ultimate consumers did not exceed \$5 million. ^{1/} In light of the Witco opinion, plaintiff determined that it also was not a "retailer" but rather qualified as an "independent producer" within the meaning of section 4992(b) and therefore was exempt from windfall profit tax on tier two stripper well oil under section 4994(g). Accordingly, on [REDACTED], plaintiff filed claims for refund for the windfall profit tax attributable to its production of such exempt tier two stripper well oil during the first two quarters of [REDACTED].

For the third and fourth quarters of [REDACTED], plaintiff reported its liability for windfall profit tax as an independent producer. On [REDACTED], plaintiff timely filed Forms 720 and 6047 for the third quarter (ended [REDACTED]) as a producer not subject to withholding from first purchasers, reporting [REDACTED] barrels of "exempt independent stripper oil."

Plaintiff's windfall profit tax returns for the quarters ended [REDACTED] through [REDACTED], were examined by the Service in [REDACTED]. The agent disagreed with plaintiff's claim that it was an independent producer on the ground that the Witco opinion was contrary to congressional intent. Accordingly, the agent proposed adjustments increasing plaintiff's WPT liability for the third and fourth quarters of [REDACTED]. The proposed adjustments were set forth on Form 5701, Notice of Proposed Adjustment, dated [REDACTED], and Form 6733, Windfall Profit Tax Examination Changes, dated [REDACTED].

On [REDACTED], the Service notified plaintiff that a statutory notice of deficiency for the third and fourth quarters of [REDACTED] would be issued immediately unless plaintiff executed Forms 4089, Notice of Deficiency-Waiver, for those taxable periods. On [REDACTED], plaintiff executed the Forms 4089. The Service made the assessments on [REDACTED].

^{1/} Prop. Reg. § 613A-7(r) defines "retailer" to include any retail outlet "where sales of oil, natural gas, or a product of oil or natural gas, accounting for more than 5 percent of the gross receipts from all sales made at such place during the taxpayer's taxable year, are systematically made to any person or persons for any purpose other than for resale." Although the proposed regulations have not been finalized, the Service is required to apply the definition of retailer found therein notwithstanding the Witco opinion.

In the Claims Court action filed by plaintiffs for a refund of the windfall profit tax paid in the first and second quarters of [REDACTED], the Department of Justice counterclaimed for the amounts assessed for the third and fourth quarters of that year. Plaintiff has moved for partial summary judgment with respect to the liability assessed for the third quarter on the ground that the assessment was barred by the statute of limitations. In support of the motion, plaintiff argues that the assessment was made more than three years after the due date of the return for the third quarter and that the six-year limitations period under I.R.C. § 6501(e)(3) does not apply because its claim of the independent producer exemption was fully disclosed on its return.

APPLICABLE LAW

I.R.C. § 4986 imposes an excise tax on the windfall profit from taxable crude oil removed from the premises during each taxable period. The tax is to be paid by the producer.

I.R.C. § 4996(b)(7) provides that the taxable period shall be March 1980 and each calendar quarter beginning after March 1980.

I.R.C. § 4995(a)(1) provides generally that, except to the extent provided in regulations, the first purchaser of any domestic crude oil shall withhold a tax equal to the amount of the tax imposed by section 4986 from amounts payable to the producer of the oil.

Treas. Reg. § 51.4995-1(a)(1)(iii) provides that the first purchaser shall not withhold tax if the producer of the oil is an integrated oil company that has furnished certification to the purchaser.

I.R.C. § 6076(a) provides that each return of the WPT for any taxable period shall be filed not later than the last day of the second month following the close of the taxable period.

Under I.R.C. § 6213(a), no assessment of a deficiency in windfall profit tax shall be made until the notice of deficiency was mailed to the taxpayer. I.R.C. § 6213(d) provides, however, that a taxpayer shall at any time have the right, by a signed notice in writing, to waive the restrictions in section 6213(a) on the assessment of the deficiency.

I.R.C. § 6501(a) provides generally that the amount of any tax imposed under the Internal Revenue Code shall be assessed within 3 years after the return was filed. Under I.R.C. § 6501(b)(1), a WPT return filed before the last day

prescribed for the filing of such return shall be considered as filed on such last day.

I.R.C. § 6501(e)(3) provides that if a return of tax imposed under a provision of subtitle D of the Code omits an amount of tax properly includable thereon which exceeds 25 percent of the amount of such tax reported thereon, the tax may be assessed within 6 years after the return is filed. Section 6501(e)(3) further provides that the amount of tax omitted on a return shall not take into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

In Shell Oil Company v. Commissioner, 90 T.C. No. 48 (April 21, 1988), the Tax Court concluded that the proper taxable period for determination of a deficiency in windfall profit tax of a producer with respect to oil not subject to withholding is a calendar quarter.

ANALYSIS

The plaintiff's WPT return for the third quarter of [REDACTED] was due no later than [REDACTED]. Thus, plaintiff's filing of the return on [REDACTED], was timely. As a consequence, in order to satisfy the general 3 year limitations period of section 6501(a), the assessment of the WPT due from plaintiff for the third quarter of [REDACTED] should have been made not later than [REDACTED]. In fact, no assessment was made until [REDACTED]. Accordingly, the assessment was barred by the statute of limitations unless one of the exceptions provided in section 6501 is applicable.

Section 6501(e)(3) allows a 6 year limitation period with respect to a WPT return that omits an amount of tax properly includable which exceeds 25 percent of the amount of tax reported on the return. On its return for the third quarter of [REDACTED], plaintiff reported [REDACTED] barrels of exempt independent stripper oil. The agent's determination that plaintiff did not qualify as an independent producer subjected the reported barrels to the WPT as tier two oil. The additional tax attributable to the reported barrels of stripper oil would exceed 25 percent of the WPT reported on plaintiff's third quarterly return for [REDACTED]. Therefore, the substantial omission requirement of section 6501(e)(3) is satisfied.

Plaintiff concedes that the 25 percent omission test is satisfied but argues nevertheless that the 6 year limitation

period is not applicable in this case because its return adequately disclosed the position that it qualified as an independent producer. Mem. at 10, 19-22. ^{2/} In so arguing, plaintiff relies on the exception ("the disclosure exception") provided in section 6501(e)(3) that excludes from the 25 percent omission test the amount of omitted tax attributable to a transaction that is adequately disclosed on the return. Mem. at 19-22.

We conclude that the exception on which plaintiff relies is not applicable to WPT. The Code expressly provides that the exception applies to "any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return" WPT is imposed by chapter 45, and chapter 45 is conspicuously absent from the chapters enumerated in the quoted passage. It is a well accepted principle of statutory construction that an explicit enumeration of exclusions from the operation of a statute is an expression of the legislative intent not to apply the statute to all cases. See J. Singer, Sutherland Statutory Construction § 47.23 (*expressio unius est exclusio alterius*) (4th ed.) Under this maxim of statutory construction, it is clear that the exception does not apply to chapter 45 because chapter 45 is not enumerated within the disclosure exception. Thus, the plain language of the statute denies plaintiff the exception it claims.

Plaintiff suggests, however, that the omission of chapter 45 from section 6501(e)(3) was not intended by Congress and seeks to have the court infer an implicit reference to chapter 45. Mem. at 11-12. Although we have found no specific indication in the legislative history of the WPT Act that Congress considered the inclusion of chapter 45 within the disclosure exception, there appears to be little basis to imply that the omission of chapter 45 was not intended.

Section 101(f) of the WPT Act made clerical changes in numerous sections of subtitle F of the Code (the subtitle containing section 6501) to add express references to chapter 45. Most of these clerical amendments involved the addition of chapter 45 to an enumeration that included chapters 41, 42, 43 and 44, similar to the one in section 6501(e)(3). ^{3/} Furthermore, section 101(g) of the Act amended section 6501 of

^{2/} "Mem." refers to Plaintiff's Memorandum of Law in Support of Its Motion for Partial Summary Judgment, dated [REDACTED].

^{3/} Such references were added to sections 6161, 6211, 6212, 6213, 6214, 6344, 6512, 6653, 6862, and 7422. 94 Stat. 252-53.

the Code by adding a new subsection (q) (now subsection (p)) to provide special limitation periods for WPT. 94 Stat. 253-54.

In light of these extensive clerical changes to subtitle F and the addition of a new subsection to section 6501, we doubt that Congress inadvertently overlooked section 6501(e)(3). On the contrary, we believe that the extent of the clerical changes contained in the WPT Act demonstrates that Congress thoroughly and carefully identified the sections in subtitle F that it intended to refer to chapter 45. Thus, we conclude that the absence of such a change to section 6501(e)(3) was the result of a conscious decision by Congress rather than the fortuitous error that plaintiff suggests. Our conclusion is supported by the fact that Congress has had several opportunities since 1980, including enactment of the 1986 Code, to add a reference to chapter 45 in section 6501(e)(3) but has not done so.


In summary, we conclude that the unambiguous language of section 6501(e)(3) should dispose of plaintiff's motion for partial summary judgment. Although plaintiff's quarterly WPT return may have adequately disclosed its claim of independent producer status, section 6501(e)(3) does not provide an exception from the 6 year limitations period for omissions of tax that exceed 25 percent in the context of the WPT. Since nothing in the legislative history of the WPT Act indicates that the omission of chapter 45 from the disclosure exception of section 6501(e)(3) was inadvertent, it is clear that the 6 year limitations period applies.

We have discussed this case with the DJ docket attorney, Mary Abate, and she has indicated that her response is required by [REDACTED]. Accordingly, we have supplied her a copy of this memorandum.

If you have any further questions, please contact Gerald B. Fleming at FTS 566-3345.

MARLENE GROSS
Director

By:


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cc: Ms. Abate